IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 404 of 2003

For Approval and Signature:

HON'BLE MR.JUSTICE C.K.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

HAJI MOHAMMED HUSSAIN NAZIR MOHAMMED LUHAR

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Revision Application No. 404 of 2003

PARTY-IN-PERSON for Petitioner No. 1

MR IM PANDYA, APP for Respondent No. 1

MR HM PARIKH for Respondent No. 2-3

CORAM : HON'BLE MR.JUSTICE C.K.BUCH

Date of decision: 03/03/2004

ORAL JUDGEMENT

1. Heard Mr. Haji Mohammed Hussain Nazir Mohammed Luhar- party in person.

2. Rule. Ld. APP Mr. I.M. Pandya appears and waives service of Rule for respondent no.1 State. Ld. Counsel Mr. HM Parikh appears and waives service of Rule for respondent nos. 2 & 3-accused. With the consent of ld. counsel appearing for the parties, matter is taken up for final hearing today.

3. It is submitted by the petitioner party-in-person that during the course of recording of oral evidence of prosecution witness, some photographs of the scene of offence taken out have been produced and they are part of the record of the trial Court. I am told by the petitioner that those photographs were also shown to IO, but the same were not taken by Investigating Officer during the course of investigation. The anxiety of the petitioner is that unless the photographs are exhibited, they can not be looked into as piece of evidence. Undisputedly, the photographs are relevant so far as contentions raised by the present petitioner are concerned.

4. It is pointed out that ld. Presiding Judge of the Court could have permitted to examine photographer who has taken photographs because he is the only competent witness who can prove the photographs by producing the negatives of it and the act of taking photographs of the scene of offence. The application under Sec.311 of CrPC, therefore, ought to have been allowed by the ld. Presiding Judge in the interest of justice.

5. Mr. Parikh, ld. counsel appearing for the respondent nos. 2 & 3 has strongly resisted this submission and submitted that initially, original complainant had attempted to see that Investigating Agency undergoes such formality or accepts the photographs taken by the photographer, in evidence. However, his say was not accepted by the Court while dealing with Cri. Rev. Application No.538/1999. The 2nd objection raised by Mr. Parikh is that the order under challenge is an interlocutory order and, therefore, no revision can sustain in light of the embargo inflicted in sub-section (2) of Sec.397 of CrPC. The third objection raised by Mr. Parikh is that since 1994, the original accused are under constant pressure of pendency of litigation and that too of a serious offence and if application is allowed, it would further protract the trial. So, on these grounds, Revision Application should be dismissed.

6. Mr. Pandya, ld. APP appearing for the State has submitted that Investigating Officer was shown photographs and he has accepted that some photographs of scene of offence were taken. So, in light of the

admission made by the Investigating Officer, appropriate orders can be passed.

7. The scheme of Sec.311 of CrPC, by itself is a Statute conferring discretionary jurisdiction on the Court conducting criminal trial. Litigation ofcourse is pending since 1994-1995 against the accused persons, but it seems that as they are on bail, trial has come up for actual conduction in the year 1999-2000. I am told that evidence was recorded in the year 1999. So, if the trial Court is directed to examine photographer named in the application filed by the present applicant, would further protract the trial for some more time, but the Court is also supposed to see that the documents viz. photographs which are already tendered and produced in evidence, need proof and application was preferred only for that limited purpose, opportunity ought to have been given. Considering the observations made by this Court while disposing of Cri. Rev. Application No.538/1999 are found relevant and so an application preferred under Sec.311 of CrPC, should have been allowed by the trial Court. Even if photographs are proved by examining photographer in a legal or proper manner, even than evidentiary value of said photographs would be a matter of appreciation in light of other evidence available on record and the case of prosecution. It is not even the case of Investigating Officer that photographs shown to him during the course of his deposition is a concoction or they are not the photographs of the scene of offence.

8. In view of above, the objections raised by ld. counsel Mr. Parikh are not sustainable. Every interim orders are not interlocutory orders within the meaning of sub-sec (2) of section 307 of CrPC. This is a case of failure in exercising discretionary jurisdiction. Normally, a relevant part of evidence can not be prevented from its legitimate entry on record of a legal proceeding on mere technicalities.

9. For the reasons aforesaid and in the larger interest of justice and Revision Application is hereby allowed. The impugned order under challenge dated 8.7.2003 is hereby quashed and set aside and ld. Addl. Sessions Judge, 2nd Fast Track Court concerned is hereby directed that he shall issue summons to the witness named in the application exh.138 under Sec.311 of CrPC to appear before him as witness to be examined for prosecution. It is obvious that this deposition of the witness shall be subject to cross-examination by the other side and questions from the Court conducting the trial. Photographs tendered in the Court to be proved by the photographer on examination and are subject to evaluation. Copies thereof shall be given to the ld.

counsel appearing for the accused in advance and preferably before 24 hours of examination of the witness in question.

10. Rule is made absolute accordingly.

[C.K. BUCH, J]

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